Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DONALD PAQUETTE,

Petitioner

v.

THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the due process clause of the Fourteenth Amendment permits a court, exercising its inherent authority, to revoke bail and order pretrial detention based on (1) a non-adversarial determination that there is probable cause to believe that the accused violated any condition of pretrial release and (2) a discretionary determination that the accused is dangerous.

2. Whether the due process clause of the Fourteenth Amendment is violated by a bail revocation statute that permits pretrial detention of an accused for sixty days in the general prison population based on (1) probable cause to arrest for any crime and (2) a discretionary determination of dangerousness, with (a) no consideration for conditional release and (b) no opportunity to re-open the hearing.

3. Whether a bail revocation statute, as construed, violates the due process requirements of the Fourteenth Amendment where an accused is incarcerated for sixty days for violating a condition of release based on (1) probable cause to arrest and (2) a discretionary determination of dangerousness, where (a) the court relies on multiple hearsay statements in a non-investigative police report, (b) specific reasons for the revocation of release are not written or provided to the accused on request, and (c) testimony by witnesses and the accused are at the discretion of the judge.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donald Paquette respectfully petitions for Writ of Certiorari to review the Judgment of the Supreme Judicial Court of Massachusetts in this case.

OPINION BELOW

The Supreme Judicial Court of Massachusetts issued a rescript opinion in this case on September 9, 2003, pursuant to local Rule 23 of the Massachusetts Rules of Appellate Procedure. On October 14, 2003, Judgment was entered on the docket and the case is published as Paquette vs. Commonwealth, ___ Mass. ___; ___ N.E.2d ___; (2003-148). That opinion is reprinted in full as Appendix A.

JURISDICTION

The Judgment of the Supreme Judicial Court of Massachusetts was entered on October 14, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part that "The right of the people to be secure in their persons,...against unreasonable...seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the...persons or things to be seized."

The Sixth Amendment to the United States Constitution provides in relevant part that "In all criminal prosecutions, the

accused shall...be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Eighth Amendment to the United States Constitution provides in relevant part that "Excessive bail shall not be required,...nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

18 U.S.C.S. § 3142 (2002)

§ 3142. Release or detention of a defendant pending trial

Appears in full at Appendix C, Page 2.

M.G.L. c. 276, § 58, Paragraph 3

§ 58. Release on personal recognizance or unsecured appearance bond; determination; fees; refusal; petition for review.

Appears in full at Appendix C, Page 11.

M.G.L. c. 276, § 58A

§ 58A. Pretrial Detention or Release on Condition for Certain Offenders; Hearing; Petition for Review.

Appears in full at Appendix C, Page 14.

STATEMENT OF THE CASE

a. Summary of the Facts

On September 23, 2002, the Petitioner (hereinafter referred to as defendant) was arraigned in district court on a charge of violating an abuse prevention order issued pursuant to M.G.L. c.209, §7A for allegedly calling the complainant on the telephone. An attorney from the Committee for Public Counsel Services (CPCS) was appointed by the court to represent him. He was subsequently released on personal recognizance following a bail review in the superior court.

On September 26, 2002 the defendant was re-arrested on the same charge, this time for allegedly having a third party call the complainant. The complainant did not report the alleged call until a day after it was supposedly made. At the arraignment on the new charge, the government requested that the defendant's release on the prior charge be revoked pursuant to paragraph three of M.G.L c.276, §58 (See App. C – 11). The district court judge (Welch, J.) scheduled a bail revocation hearing for the following morning, September 27, 2002. Shortly before the hearing began, the judge appointed a different CPCS attorney to represent the defendant at the revocation proceeding.

The only evidence submitted by the government in support of its request for revocation was a half page, typewritten offense report and a copy of the defendant's board of probation record. Reading from the offense report, the prosecutor advised the judge of the allegation that the defendant had his roommate call the complainant on the telephone. The prosecutor then requested that

the court revoke the defendant's release based on dangerousness and for not following the orders of the court.

At the outset of his argument, Defense counsel confirmed with the court that only the alleged new offense could be considered for purposes of the revocation. He proceeded to argue that the restraining order may not even be valid based on information he had that indicated service of the order may not have been made to the defendant. He also argued that there was possibly an issue as to whether the alleged "permanent" restraining order was constitutional. As to these issues, defense counsel requested the court hold a separate hearing, arguing that if the order wasn't valid there would be no legal basis for the new charge and thus no basis for a revocation. That request was not granted and the bail revocation proceeding continued.

Citing Commonwealth v. Durling, 407 Mass. 108 (1990), counsel argued against revocation stating that the police report offered by the Commonwealth was unreliable because it contained only multiple levels of hearsay, and the government had failed to produce any independent evidence whatsoever in support of its request. Counsel also argued that the complainant's reliability was at issue based on information that she may have a criminal record.

The judge then stated he found probable cause to believe the defendant committed a new crime and revoked his release, ordering him held for up to sixty days in the House of Correction. The judge made no reference or finding on the record as to the defendant's dangerousness, but filled out a pre-printed form entitled "Revocation of Release." (See App. B – 2).

Defense counsel objected to the revocation of bail citing articles 12, 11 and 14 of the Massachusetts Declaration of Rights and the 4th, 5th, 6th and 14th Amendments to the United States Constitution, arguing that the defendant had been denied a hearing, denied an opportunity to discover the validity of the restraining order, denied the right to counsel, and denied the right to testify. Noting the objections, the judge then reaffirmed the order revoking bail.

Following a short recess, on the record and with all parties still present, defense counsel requested that the court re-open the bail revocation hearing to allow testimony of two defense witnesses who, (unbeknownst to him previously), had been present at the earlier hearing and had instructed only the court officers that they wished to testify for the defendant. Counsel advised the court that the first witness was the person alleged to have made the telephone call to the complainant and that he would deny having made such a call, and the second witness would testify that the complainant had told her she was going to frame the defendant with a claim that he violated a restraining order. After advising the Court of the nature of the testimony being offered, Counsel was denied a further hearing.

Immediately thereafter, defense counsel submitted a written motion for findings of fact and rulings of law, stating such was necessary for purposes of a possible interlocutory appeal. That motion was also denied.

b. Course of Proceedings and Disposition Below

On October 7, 2002, the defendant filed a petition for writ of habeas corpus in the Superior Court challenging the revocation of bail. On October 15, 2002 the petition was denied for lack of jurisdiction. On October 21, 2002, the defendant filed a Petition for Extraordinary Relief to a single justice of the Supreme Judicial Court of Massachusetts pursuant to M.G.L c.211, §3, seeking to vacate the pretrial detention order of the District Court.

After a hearing on October 27, 2002, the single justice (Spina, J.) reserved and reported the case to the full court because it raised questions having statewide significance. The question of law reported was "What procedure is required when a defendant's bail is revoked pursuant to M.G.L. c.276, §58, and whether that procedure was followed with respect to defendant Paquette." The parties submitted briefs and oral arguments were held on May 6, 2003.

As to paragraph three of M.G.L. c.276, §58, the bail revocation statute, the defendant argued that since there is no relationship between the commission of non-violent crimes and dangerousness, the statute is not narrowly tailored to further a compelling government interest and is therefore unconstitutional because it constitutes punishment prior to a finding of guilt. That paragraph allows revocation of release and pretrial detention for the probable commission of *any* crime, whenever a judge, in his or her discretion, believes an accused is dangerous.

Further, he argued that the procedure outlined in paragraph three does not provide minimum due process protections because it

does not require the government to present any witnesses, nor does it grant an accused other necessary rights such as the right to testify or present witnesses at a revocation hearing, the opportunity to re-open the hearing, the opportunity for conditional release, or the right to be held separately from those convicted while being detained.

Moreover, the defendant argued that the only constitutionally acceptable standard of proof in a pretrial detention hearing based on dangerousness is by clear and convincing evidence. Furthermore, that the process to determine whether there is probable cause that a crime was committed must be one akin to that in making a directed verdict determination, not merely based on a finding that there was probable cause to arrest.

Finally, the defendant argued that paragraph three of M.G.L. c.276, §58 violates the equal protection clause because it allows the government exclusively to choose a less protective procedure when seeking pretrial detention based on dangerousness than that mandated under M.G.L. c.276, §58A, (which specifically deals with pretrial detention based on dangerousness), even though the alleged crime is one specifically enumerated under that section.

Turning specifically to the issues in his case, defendant argued first that his constitutional right to due process was violated by the district court's reliance on unsubstantiated, unreliable hearsay evidence in revoking his release, without any requirement that the government show good cause for not presenting witnesses.

Next, he argued that the district court violated his right to due process by refusing to provide a written statement of reasons

for ordering pretrial detention, and furthermore, that the order of pretrial detention was unconstitutional because there was no finding on the record of dangerousness. Finally, that based on the offense with which he was charged, the appropriate hearing should have been pursuant to M.G.L. c.276, §58A, which closely mirrors the procedure for pretrial detention under 18 U.S.C.S. §3142 and affords the required due process protections.

Following oral arguments in May 2003, on September 9, 2003 the Supreme Judicial Court directed that an order affirming the bail revocation be entered. The final entry of judgment was made on the docket October 14, 2003 in accordance with Rule 28 of the Massachusetts Rules of Appellate Procedure. The case is reported as Paquette vs. Commonwealth, ___ Mass. ___; ___ N.E.2d ___; (2003-148) and is reprinted herein at Appendix A.[1]

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES IMPORTANT CONSTITUTIONAL QUESTIONS CAPABLE OF REPETITION YET LIKELY TO ESCAPE REVIEW

Paragraph three of M.G.L. c.276, §58 permits a court to revoke bail and order pretrial detention for up to sixty days. It is highly likely that in a majority of cases, like the one at bar, before a challenge to the revocation process can reasonably be prepared and acted upon, the issue will have passed. Such is likely by either the

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[1] After serving sixty days of pretrial detention but prior to entry of the judgment, the Petitioner was released and both of the charges against him discussed herein were ultimately dismissed.

accused having served the sixty days, by entry of a plea during the pretrial detention period, or by dismissal of the charge(s). Furthermore, given that the only means to review a bail revocation is by petition for extraordinary relief to a single justice of the State's highest court, a time-consuming process indeed, it is even more likely that the sixty days will pass before review can occur. See Sheriff of Suffolk Cty. v. Pires, 438 Mass. 96, 100; 777 N.E.2d 1231, 1234 (2002); Delaney v. Commonwealth, 415 Mass. 490, 497; 614 N.E.2d 672 (1993). In similar circumstances to this where a controversy was "by its nature short-lived," this Court concluded that a case is not moot where it may be capable of repetition yet evade review. Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976).

While it is generally required that in order to avoid mootness, both the challenged action must in its duration be too short to be fully litigated prior to its cessation or expiration, and also that there is a reasonable expectation that the same complaining party would be subjected to the same action again, Murphy v. Hunt, 455 U.S. 478 (1982), in United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), this Court recognized that "Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." Id., at 399. Moreover, in a case similar to this one where pretrial detention was an issue, this Court found it a suitable exception to the general requirements stating "It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class." Gerstein v. Pugh, 420 U.S. 103, 111; 95 S. Ct. 854, 861 (1975).

Applying these principles, Petitioner respectfully requests that the Court find his case a suitable exception to the general requirements, thereby avoiding mootness and allowing review of the important constitutional questions.

II. PRETRIAL DETENTION PURSUANT TO PARAGRAPH THREE OF M.G.L c.276, §58 DOES NOT COMPORT WITH MINIMUM DUE PROCESS REQUIRED UNDER THE FEDERAL BAIL STATUTE AT 18 U.S.C. §3142

Paragraph three of M.G.L. c.276, §58 allows pretrial detention of an accused based on a discretionary judicial determination of dangerousness, after a finding of probable cause that the accused committed *any* crime while on release. The Supreme Judicial Court in this case instructs further that in a proceeding to revoke bail under paragraph three, "an evidentiary hearing with the right to present and cross-examine witnesses, or some variation, *may* be held *in the judge's discretion* when the circumstances of a particular case warrant." (emphasis added) (See App. A – 16).

The Federal Bail Statute, 18 U.S.C. §3142 outlines specifically the process a court must follow before issuing an order for pretrial detention of an accused based on dangerousness. This Court, in United States v. Salerno, 481 U.S. 739, 750 S. Ct. 2095 (1987) held that those procedures fully comport with constitutional requirements. "In a full-blown adversary hearing, the Government must convince a neutral decision-maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." Id., 750 (citation omitted).

The hearing required pursuant to the Massachusetts bail revocation statute is far less than the "full blown adversarial hearing" described in Salerno. Among the procedural requirements absent from the Massachusetts bail revocation statute are that the government be required to present witnesses, the right for an accused to testify or present witnesses, the opportunity for an accused to re-open the hearing, the opportunity for conditional release, or the right to be held separately from those convicted while being detained. Moreover, a finding of dangerousness need not even be supported by the constitutionally valid clear and convincing evidence standard, but instead is made at the discretion of the judge. Such procedures do not comport with federal due process requirements when making determinations of dangerousness that hold as a consequence pretrial detention of an accused individual. While these due process protections are absent from the Massachusetts bail revocation statute, they are all present in another section of the law, M.G.L. c.276, §58A, which was adopted in 1992 following the decision in Salerno. That section applies only to a specific group of crimes identified as serious or violent and specifically addresses the procedures necessary when the government seeks to detain an accused based on dangerousness and very closely mirrors the requirements in Federal Bail Statute at 18 U.S.C §3142. (See App. C – 2, 14). What is additionally unfair is that notwithstanding §58A, even in a case such as this one where an accused is charged with an offense specifically enumerated there, the government may, at its discretion, choose instead to proceed pursuant to the bail revocation section (paragraph three, §58), thus avoiding a significantly more protective process. This is unfair and violates established principles of due process.

Finally, 18 U.S.C. §3148(b) addresses the procedure that is required in order to revoke the release of an accused who had been previously released *after* a judicial finding of dangerousness pursuant to §3142. In that case, the court is required to conduct another hearing pursuant to that section. Furthermore, consideration of conditional release is called for except in certain limited circumstances. In effect, under the federal revocation statute, a person previously adjudicated to be dangerous who is facing revocation of release receives more due process than an individual subject to potential revocation in Massachusetts who has never been adjudicated as dangerous.

III. DUE PROCESS UNDER THE FOURTEENTH AMENDMENT DEMANDS THAT IN A BAIL REVOCATION PROCEEDING WHERE PRETRIAL DETENTION OF AN ACCUSED IS SOUGHT FOR A SUBSTANTIAL PERIOD, EVIDENCE MUST BE SUBSTANTIALLY RELIABLE

This Court has found that "Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." Gerstein v. Pugh, 420 U.S. 103, 125; 95 S. Ct. 854, 868 (1975). Even where an accused has already been convicted, the Circuit Court in the District of Columbia has recently held that "Revocation of parole requires more than a finding of probable cause and must be based on verifiable facts." Crawford v. Jackson, 323 F.3d 123, 129; No. 02-7009 (2003). Stating it joined the other circuits "in expressing concern about the reliance in parole revocation hearings on hearsay in police reports," the Circuit Court in Crawford further directed

that "a decision to revoke...will not be judicially sustained where it relies solely on hearsay...in a police report as the basis for its decision." Id.

In another recent case similar to the one at bar but involving a federal bail revocation issue, the Second Circuit Court addressed the necessity for reliable evidence. U.S. v. LaFontaine, 210 F.3d 125, 131, Docket No. 00-1157, (2000). There, noting at the outset that the case raised issues of first impression concerning the constitutionality of proffers in bail revocation proceedings under the federal statute, the Second Circuit Court advised:

> ...[T]his court has recognized that while the informality of bail hearings serves the demands of speed, the....judge must insure the reliability of the evidence "by selectively insisting upon the production of the underlying evidence or evidentiary sources where their accuracy is in question." Martir, 782 F.2d at 1147 (emphasis omitted) (quoting Acevedo-Ramos, 755 F.2d at 207). In Martir, a case where the government argued that defendant posed a risk of flight and proceeded solely by proffer, we stated that "in the informal evidentiary framework of a detention hearing, the methods used to scrutinize government proffers for reliability must lie within the discretion of the presiding judicial officer, informed by an awareness of the high stakes involved." Id. at 1147. In that case, we criticized the government's proffer for simply stating in "general and conclusory terms what it hoped to prove," for failing to refer to any "independent evidence, such as tapes,

documents, or photographs," and for failing to furnish any testimony or affidavits. Id., at 131

Ruling on the sufficiency of the evidence in the present case, the Supreme Judicial Court noted that "Statements of police officers concerning their own observations and a description of their own activities, as well as those of other officers, are similarly reliable for purposes of establishing probable cause." (citation omitted) (See App. A – 17). Without more, the court then concluded that the district court judge could properly rely on the information in the police report to make a determination of probable cause. That conclusion is unsupported by any proffer by the government of substantially reliable evidence. Moreover, the evidence in this case was significantly less substantial than the government proffer that was at issue in Lafontaine. In that case, where it was argued that the lower court could not rely solely on a proffer by the government to revoke bail, the Circuit Court found that it was "inaccurate to characterize the court's decision as based solely on the government's proffer...the proffer was corroborated by extrinsic evidence such as the...tape. Further,...the proffer was not contradicted by...witnesses." Id.

In this case the officer who wrote the proffered report did not testify at the hearing, nor did the alleged third party who was reported to have made the telephone contact with the complainant, nor did the complainant herself. Instead, at the revocation hearing, the prosecutor simply read from the officer's report. The only reference in the report as to the officer's own activities was that he made a telephone call to verify that a restraining order against the defendant existed, without noting whether service had been made on the defendant. The report was further devoid of any detail

whatsoever about how or exactly when the complaint was taken, whether the officer met with the complainant in person or received the complaint by telephone, what number the alleged call was received at, or whether any investigation was done to corroborate that a call was even made. There was no indication whatsoever in the report as to the whether the complainant had any concern about being in danger, however, it was certainly indicative from the report that she was not since the alleged telephone call wasn't reported to police until a day later. What the government's testimonial evidence amounted to was nothing more than the prosecutor *telling* the judge that the police officer *wrote* that the complainant *said* that the defendant's friend *said* that the defendant *said* to contact her. Multiple hearsay statements such as these cannot possibly support a probability that a crime was committed when a person who is presumed innocent is facing sixty days incarceration in the general prison population among those already convicted. "[T]he prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial..." Gerstein at 119. Unlike the case where a person is held pursuant to the Fourth Amendment for the purposes of further proceedings, when a person is detained pending trial "the standard of proof required of the prosecution is usually referred to as 'probable cause' but in some jurisdictions it may approach a prima facie case of guilt. (citation omitted) When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the state and the accused justifies the presentation of witnesses and full exploration of their testimony on cross examination." Gerstein at 119, 120.

As to whether sixty days incarceration constitutes a substantial period of detention, this Court has indicated that pretrial

detention for a period of thirty days constitutes a substantial amount of time.

> The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days,...and arraignment, which...was often delayed a month or more after arrest. Pugh v. Rainwater, 332 F.Supp. 1107, 1110 (SD Fla. 1971). As a result,...a person...could be detained for a substantial period solely on the decision of a prosecutor. Gerstein, at 125.

Applying that principal, the sixty days pretrial detention involved must certainly be considered a substantial period of detention.

IV. THE PROCEDURE SANCTIONED BY THE SUPREME JUDICIAL COURT REVOKING BAIL UNDER ITS INHERENT AUTHORITY AMOUNTS TO PUNISHMENT FOR CONTEMPT WITHOUT MINIMUM DUE PROCESS AND IS AN ABUSE OF DISCRETION

This Court has recognized that even for state proceedings, the label affixed to contempt ultimately "will not be allowed to defeat the applicable protections of federal constitutional law." United Mine Workers v. Bagwell, 512 U.S. 821 (1994) citing Hicks v. Feiock, 485 U.S. at 631.

While "it is firmly established that the power to punish for contempt is inherent in all courts," and that power "...reaches both conduct before the court and that beyond the court's confines,..." Chambers v. Nasco, Inc., 501 U.S. 32, 43 (1991); See also Young

v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 798 (1987) (citations omitted), such power is not without significant limitations. "Because of their very potency, inherent powers must be exercised with restraint and discretion." Id., at 44; See also, Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). "A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process..." Id., at 48.

In Carlisle v. U.S, 517 U.S. 416, 426 (1996), this Court instructed that "Whatever the scope of federal courts' inherent power to formulate procedural rules not specifically required by the Constitution or the Congress, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure," and that "federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." Id., at 426. See e.g., Bank of Nova Scotia v. United States, 487 U. S. 250, 254-255.

The Fifth Circuit Court recently concurred that inherent power "is not a broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function." Crowe v. Smith, 151 F.3d 217-220, No. 96-30851 (5th Cir.) (1998), citing Chambers, 501 U.S. at 42 (quoting NASCO, Inc. v. Calcasieu Television and Radio, Inc., 894 F.2d 696, 702 (5th Cir. 1990)). Further, "As the Supreme Court has explained, '[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." Crowe at 217, citing Shepherd v. American Broadcasting Companies, 62 F.3d 1469, 1475 (D.C. Cir. 1995)), quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)).

Despite the abundant federal case law on the exercise of inherent authority and its limitations, the Massachusetts Supreme Judicial Court relied on the few state cases discussing bail revocation procedures, concluding that "Notwithstanding the provisions of the third paragraph of G. L. c. 276, § 58, and any inquiry into dangerousness, a court has inherent power to revoke a defendant's bail for breach of any condition of release." (See App. A - 9). That conclusion is not supported by federal law or even by any of the decisions cited in its opinion. Furthermore, it is significant to note that most of the cases relied upon by the court were decided well before the bail statutes were reformed in 1984.

First, in Rendel v. Mummert, 106 Ariz. 233; 474 P.2d 824 (1970), the only mention of inherent authority to revoke release refers to revocation when the court finds a defendant may flee to avoid trial. Id., at 238. In addition to adding little support for the revocation of bail by inherent authority, the probable cause described in that case that is necessary to revoke bail is "more evidence for, rather than against....guilt,...and there must exist such...facts...to believe and conscientiously entertain a strong suspicion...of...guilt...." Id., at 238. That is a much more demanding one than the probable cause to arrest standard sanctioned by the Supreme Judicial Court in the case at bar.

In People ex rel. Hemingway v. Elrod, 322 N.E.2d 837, 60 Ill.2d 74 (1975), the Illinois Supreme Court was not dealing with an issue of inherent authority to revoke bail, but the sole issue was whether an accused charged with murder may be held without bail where punishment by death was not a possibility. Nevertheless, the Supreme Judicial Court cites that case to support the concept of revocation by inherent authority, summarizing that "The court has

the inherent authority to enforce its orders and to require reasonable conduct from those over whom it has jurisdiction." (See App. A - 10). What that case in fact authorizes is not inherent authority under any condition to revoke bail, but only in specific circumstances such as "keeping an accused in custody pending trial to prevent interference with witnesses or jurors or to prevent the fulfillment of threats... 'We think that under both the United States and Illinois constitutions the denial of bail to an accused *under such circumstances* is within the inherent power of the court.'" Id., at 840, 841. (emphasis added). What the Supreme Judicial Court did not include from Hemingway is that the Ill. Code of Criminal Procedure sets out a very specific process to be followed when inherent authority is exercised when bringing a defendant before the court for a hearing on an alleged breach or threatened breach of any of the conditions of the bail bond. Ill. Code of Criminal Procedure, §110.6(a)(d). The court there recognized those limitations of its authority, instructing that "...the court has the authority *to impose sanctions* for the violation of conditions...while released on bail or recognizance, including...revocation of...release *in the manner provided in Standards 5.6, 5.7 and 5.8.* (emphasis added). It is also significant to note that in their *current* form, the relevant sections of the Illinois bail statute dealing with revocation of bail include much greater procedural protections than the Massachusetts revocation statute and the procedure sanctioned by the court in this case. Those protections include revocation only for specific crimes, clear and convincing evidence, the opportunity for the accused to testify, to present witnesses in his behalf, and to cross examine witnesses if any are called by the State. See Ill. Code of Criminal Procedure, §110.6.

Another case relied on by the Supreme Judicial Court is Ct. v. Ayala, 22 Conn. 331 (1992). That court also did not exercise inherent authority to revoke bail. To the contrary, an evidentiary hearing was held in accordance with a constitutional statutory scheme for revoking bail. Id., at 336. In addition to providing little support to revocation of bail by inherent authority, the procedure there was much more demanding than the procedures sanctioned by the court in the case at bar. In order to revoke bail there, the court first had to find that the crime for which the defendant had been on release was one punishable by a term of ten or more years in prison. Next, there must have been a finding by clear and convincing evidence that the defendant posed a danger to another, and finally, that there was probable cause the defendant had committed a crime while on release. Id., at 333, 334.

The final case relied on by the Supreme Judicial Court is Mello v. Superior Court, 117 R.I. 578 (1977), which is the only case cited that supports bail revocation of bail under the court's inherent authority. Notwithstanding that contention, the court in Mello went on to emphasize the need for adequate procedural protections, directing that "a defendant facing bail revocation is jeopardized at least as much as one facing revocation of parole or probation....therefore the rights afforded ...in these latter situations must attach to a defendant in a bail revocation proceeding." Id., at 587. Moreover, the court there recognized that the due process requirements apply to bail revocation proceedings, stating "one cannot argue that the deprivation of liberty which follows....revocation does not condemn one to suffer grievous loss." Id., at 586, citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 647 (1951). The court in Mello also directed a higher standard of proof than probable cause

at such a hearing, stating "We adopt that standard of proof for bail revocation hearings as one which will require the state to go beyond probable cause and will afford a defendant the necessary due process." Mello, at 587.

An examination of the Supreme Judicial Court's own position on the exercise of inherent authority in a relatively recent case seems to reveal a very different viewpoint than the decision in this case. In, Brach v. Chief Justice of the District Court Department, 386 Mass. 528 (1982), the court stated that inherent powers are those "whose exercise is essential to the function of the judicial department, to the maintenance of its authority, or to its capacity to decide cases." Brach, citing Sheriff of Middlesex Cty. v. Comm. of Corr., 383 Mass 904, 922 (1974). Adding further that "All of the inherent powers recognized by this court, however, have involved the internal functioning of the judiciary," Id., at 535 and, "[t]he very conception of inherent authority carries with it the implication that its use is for occasions not provided for by established methods..." Id., at 536. 4

While declaring that it has the power to exercise its inherent authority to revoke bail, the Supreme Judicial Court in this case never discussed such in the context of "contempt." In fact, the only use of the word contempt in their opinion appears in cases cited. (See App. A - 10). Yet by their own description, the revocation of bail at issue was clearly for contempt. First, the court disclaimed that the purpose of revoking bail under §58 is to protect the public from danger, only doing so incidentally, but that its purpose is really "to ensure compliance with our legal system and preserve its integrity" and "assure compliance with...laws and.... preserve the integrity of the judicial process by exacting obedience

with its lawful orders." (See App. A – 11, 12). This amounts to contempt as it has historically been described by this and other courts. See United States v. Dixon, 509, U.S. 688 (1993) "To place these cases in context, one must understand that they are the consequence of an historically anomalous use of the contempt power. In both...a court-issued an order directing a particular individual not to commit criminal offenses." Id. at 694. That is exactly what happened in this case.

While disclaiming dangerousness as a basis for revocation may allow avoidance of the more demanding procedures required under §58A, the court cannot then be allowed to rely on the concept of contempt, yet authorize an unprecedented, less protective procedure than that which is historically required in such an action. While it is well settled that "the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law." Young v. U.S. ex rel. Vuitton, 481 U.S. 787 (1987) quoting Michaelson v. U.S. ex rel. Chicago, St. P.,M., & O.R. Co., 266 U.S. 42 (1924), it is equally well established that certain procedures must be followed in such cases. In United Mine Workers v. Bagwell, this Court instructed clearly on the process that is due in contempt actions:

> "Summary adjudication becomes less justifiable once a court leaves the realm of immediately sanctioned, petty, direct contemps."... "Still further procedural protections are afforded for contempts occurring out of court, where the considerations justifying expedited procedures do not pertain. Summary adjudication of indirect contempts is prohibited, e.g., Cooke v. United States, 267 U.S. 517, 534 (1925), and criminal contempt sanctions are entitled

> to full criminal process. E.g., Hicks, 485 U.S. at 632." and "Contempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable factfinding. Cf. Green, 356 U.S. at 217, n. 33 (Black, J., dissenting) (citation omitted) ("Alleged contempts committed beyond the court's presence where the judge has no personal knowledge of the material facts are especially suited for trial by jury. A hearing must be held, witnesses must be called, and evidence taken in any event."…. "Under these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power." Bagwell, at 832, 833.

Other leading cases providing direction on the proper procedure in a criminal contempt direct that:

> "Due process cannot be measured in minutes and hours or dollars and cents. For the accused contemnor facing a jail sentence, his 'liberty is valuable and must be seen as within the protection of the fourteenth amendment. Its termination calls for some orderly process, however informal'" Taylor v. Hayes, 418 U.S. 488, 500 (1974) quoting Morrissey v. Brewer, 408 u.s. 471, 482 (1972).

and also:

> The distinction between in-court and out-of-court contempts has been drawn not to define when a court has authority to initiate a contempt prosecution, but to

> prescribe the procedures that must attend the exercise of that authority.....Thus, for instance, this Court has found that defendants in criminal contempt proceedings must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves, Gompers, supra, at 444; must be advised of [481 U.S. 799] charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses, Cooke v. United States, 267 U.S. 517, 537 (1925); must be given a public trial before an unbiased judge, In re Oliver, 333 U.S. 257 (1948); and must be afforded a jury trial for serious contempts, Bloom, supra. Congress also has regulated the manner in which courts exercise their power to prosecute contempts, narrowing the class of contempts subject to summary punishment, Act of Mar. 2, 1831, 4 Stat. 487. Furthermore, Rule 42 itself distinguishes between contempt committed in the presence of the court, which may be summarily punished, and all other contempts, which may be punished only upon notice and hearing....The use of this Court's supervisory authority has played a prominent role in ensuring that contempt proceedings are conducted in a manner consistent with basic notions of fairness. (footnotes omitted). Young v. U.S. ex rel. Vuitton, 481 U.S. 787, 798, 799 (1987).

and finally, in determining the nature of the proceeding for purposes of applying due process:

> When a State's proceedings are involved, state law provides strong guidance about whether or not the State

> is exercising its authority "in a nonpunitive, noncriminal manner," and one who challenges the State's classification of the relief imposed as "civil" or "criminal" may be required to show "the clearest proof" that it is not correct as a matter of federal law. Allen v. Illinois, 478 U.S. 364, 368-369 (1986). Nonetheless, if such a challenge is substantiated, then the labels affixed either to the proceeding or to the relief imposed under state law are not controlling, and will not be allowed to defeat the applicable protections of federal constitutional law. Ibid. This is particularly so in the codified laws of contempt, where the "civil" and "criminal" labels of the law have become increasingly blurred. (footnotes omitted). Hicks v. Feiock, 485 U.S. 624 , 631 (1988).

and,

> Instead, the critical features are the substance of the proceeding and the character of the relief that the proceeding will afford. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt, the sentence is punitive, to vindicate the authority of the court. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911). The character of the relief imposed is thus ascertainable by applying a few straightforward [485 U.S. 632] rules. If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the

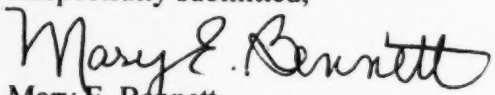
sentence is limited to imprisonment for a definite period." Id. at 442. Hicks, at 631, 632.

The Supreme Judicial Court's contention in the case at bar that "determinations of probable cause and dangerousness can be made without a full-blown evidentiary hearing and without "significant risk of an erroneous deprivation of liberty.", and "...can be adequately presented and decided based on documents (e.g., police reports) and the representations of counsel.," and that "an evidentiary hearing with the right to present and cross-examine witnesses, or some variation, *may* be held *in the judge's discretion* when the circumstances of a particular case warrant." (emphasis added) (See App. A - 16), represents a drastic departure from settled constitutional law that contempt proceedings must afford the accused certain minimum due process protections. In this case, the procedure sanctioned by the court was contrary to those principals, unfair, and in violation of the Petitioner's rights under the Fourteenth Amendment.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,



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___ Mass. ___ (2003-148)

PAQUETTE vs. COMMONWEALTH

___ N.E.2d ___

Parties: DONALD PAQUETTE vs. COMMONWEALTH

Docket No.: SJC-08938

County: Suffolk
Dates: May 6, 2003. - September 9, 2003.

Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, & Cordy, JJ.

Summary: Bail. Practice, Criminal, Detainer. Due Process of Law, Pretrial detainees, Hearing. Evidence, Hearsay. Probable Cause

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on October 21, 2002.

The case was reported by Spina, J.

Mary E. Bennett for the plaintiff.

Sharon L. Sullivan-Puccini, Assistant District Attorney, for the Commonwealth.

Brownlow M. Speer, Committee for Public Counsel Services, for Committee for Public Counsel Services, amicus curiae, submitted a brief.

SPINA, J. In this case, we examine the constitutionality of paragraph three of G. L. c. 276, § 58, and consider the conditions for the revocation of a defendant's bail when he is charged with committing a subsequent crime during the period of his release on bail. A judge in the District Court ordered that Donald Paquette (defendant) be held without bail under this statutory provision for his alleged violation of an abuse prevention order issued pursuant to G. L. c. 209A, § 7. The defendant filed a petition for relief pursuant to G. L. c. 211, § 3, challenging the judge's order. A single justice of this court reserved and reported the case, without decision, to the full court. For the reasons set forth below, we affirm the order revoking the defendant's bail.(1)

1. Background. The facts, as set forth by the parties in a statement of agreed facts, are as follows. On September 23, 2002, the defendant was arrested and arraigned in the Fall River District Court on a charge of violating an abuse prevention order issued pursuant to G. L. c. 209A, § 7. The alleged violation had occurred the previous day when the defendant telephoned the complainant and told her that he was coming over to her apartment to see her. Following a hearing, cash bail was set in the amount of $5,000, with conditions, and the defendant was advised of the potential for bail revocation pursuant to G. L. c. 276, § 58, if he were charged with committing a subsequent offense during the period of his release. On September 24, 2002, after a bail review hearing in the Superior Court, the defendant was released on personal recognizance.

On September 26, 2002, the defendant was again arrested and arraigned in the Fall River District Court on a charge of violating the same abuse prevention order issued pursuant to G. L. c. 209A, § 7. The alleged violation had occurred the previous day and involved another telephone call made to the same complainant. The Commonwealth requested that the judge revoke the defendant's bail on the prior charge. The defendant was held overnight, pending a bail revocation hearing the next day. At the hearing, the Commonwealth argued that bail revocation was warranted because the defendant had been given a bail revocation warning and had committed a new offense on September 25, 2002. The Commonwealth presented to the court the police report for the September 25 incident and the defendant's board of probation record. The judge found probable cause to believe that the defendant had committed a new crime during the period that he had been free on bail. The judge further determined that the release of the defendant would seriously endanger another person and the community, and that the defendant's detention was necessary to reasonably assure their safety. Accordingly, the judge revoked the defendant's bail. The judge filled out a form entitled "Revocation of Terms of Release" that set forth his findings and his revocation order pursuant to G. L. c. 276, § 58.(2)

Later that same day, defense counsel requested that the bail revocation proceeding be reopened. Defense counsel informed the judge that, after the hearing, he had been approached by two witnesses who cast doubt on whether the defendant had, in fact, violated the abuse prevention order. Defense counsel sought the opportunity to present the testimony of these two witnesses and argued that, pursuant to G. L. c. 276, § 58, the court could not fairly deny his request for a further hearing on the issue of probable

cause. The judge stated that he had already found probable cause based on the statements from the district attorney and the police report. The judge pointed out that the defendant had been given a hearing, that the defendant's arguments went to the merits of the case, and that defense counsel could file a motion to dismiss the case if he had evidence that the crime had not been committed. The judge denied the defendant's request for a further hearing. Defense counsel then filed a motion requesting findings of fact and rulings of law from the judge in support of his decision to revoke the defendant's bail. The motion was denied.

On October 7, 2002, the defendant filed in the Superior Court an emergency petition for writ of habeas corpus, challenging the legality of his pretrial detention based on the bail revocation proceeding. The defendant claimed that such proceeding violated G. L. c. 276, § 58, and his rights to due process under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and arts. 1, 7, 12, and 26 of the Massachusetts Declaration of Rights. The sheriff of Bristol County, represented by the Attorney General, filed a motion to dismiss the petition for writ of habeas corpus. Following a hearing, a judge denied the defendant's petition and dismissed the case for lack of jurisdiction. The defendant then filed his petition for relief pursuant to G. L. c. 211, § 3.

2. Constitutional claims. The thrust of the defendant's arguments is that the third paragraph of G. L. c. 276, § 58, is unconstitutional because it violates the substantive and procedural due process provisions of the Fourteenth Amendment and arts. 1, 10, and 12. He contends that this statutory provision is not narrowly tailored to further a compelling government interest because it permits the pretrial detention of defendants charged with the commission of any subsequent offense during the period of their

release on bail, not merely those defendants charged with committing acts of physical force or violence whose release may actually pose a danger to the community. The defendant argues that the judge's mandatory statutory inquiry into dangerousness essentially creates a broad preventive detention scheme that is punitive in nature without a finding of the defendant's guilt beyond a reasonable doubt. Furthermore, the defendant contends that the third paragraph of G. L. c. 276, § 58, is unconstitutional because it does not provide adequate procedural safeguards against the erroneous deprivation of liberty where pretrial detention may be ordered, at the judge's discretion, on a mere suspicion of dangerousness.(3)

(a) Substantive due process. "So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' Rochin v. California, 342 U.S. 165, 172 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325-326 (1937)." United States v. Salerno, 481 U.S. 739, 746 (1987). Where, as here, the right involved, freedom from physical restraint, is "fundamental," we "'must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation,' Moore v. East Cleveland, 431 U.S. 494, 499 (1977)." Aime v. Commonwealth, 414 Mass. 667, 673 (1993). See Commonwealth v. Bruno, 432 Mass. 489, 503 (2000). A State "may impose a regulatory restraint on the individual in narrowly-circumscribed situations." Aime v. Commonwealth, supra at 677-678. A statute imposing such a restraint typically will be upheld only if it is "narrowly tailored to further a legitimate and compelling governmental interest." Id. at 673. See Commonwealth v. Querubin, ante , (2003).

General Laws c. 276, § 58, sets forth the conditions both for a defendant's initial release on bail pending adjudication of the charges against him, and for the possible revocation of bail if he is charged with committing a subsequent offense during the period of his release. The first paragraph of § 58 provides, in relevant part:

> "A justice or a clerk or assistant clerk of the district court . . . in accordance with the applicable provisions of section fifty-seven, shall, when a person is held under arrest or committed either with or without a warrant for an offense other than an offense punishable by death . . . hold a hearing in which the defendant and his counsel, if any, may participate and inquire into the case and shall admit such person to bail on his personal recognizance without surety unless said justice, clerk or assistant clerk . . . determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person before the court."

The preferred result under G. L. c. 276, § 58, is release on personal recognizance. See Commonwealth v. Dodge, 428 Mass. 860, 865 (1999), and cases cited. "This statute 'was not intended to give the courts discretion to deny bail but rather to establish the right of the accused, in most circumstances, to be admitted to bail.'" Commonwealth v. Finelli, 422 Mass. 860, 863 (1996), quoting Commonwealth v. Roukous, 2 Mass. App. Ct. 378, 381 (1974). See Commonwealth v. Hampe, 419 Mass. 514, 519 (1995) ("an arrestee must be released on bail without surety unless there is a risk that he will not appear in court"); Delaney v. Commonwealth, 415 Mass. 490, 495 (1993) ("Our Legislature intended § 58 to protect the rights of the defendant by establishing a presumption that he or she will be admitted to bail on personal recognizance without surety

and by delineating carefully the circumstances under which bail may be denied").

Pursuant to the first paragraph of G. L. c. 276, § 58, when a person is originally admitted to bail, he must be advised that, as an explicit condition of release, "should said person be charged with a crime during the period of his release, his bail may be revoked in accordance with the third paragraph of [§ 58]."(4) The import of this clear statutory language is that the liberty interest of a person admitted to bail is conditional; if the person violates the explicit condition of his release, then his liberty can be curtailed. Cf. Commonwealth v. Durling, 407 Mass. 108, 115 (1990) (discussing conditional liberty interest of probationer). Thus, while paragraph one of G. L. c. 276, § 58, contains the preference, in most circumstances, for admitting a defendant to bail pending trial, "the keys to continued freedom are left in the pocket of the accused." Rendel v. Mummert, 106 Ariz. 233, 238 (1970).

If a defendant is charged with committing a new offense during the period of his release on a prior charge, the third paragraph of G. L. c. 276, § 58, requires a judge before whom the new charge is pending to make two inquiries in determining whether the defendant's bail on the prior charge may be revoked and the defendant held without bail. First, the judge must ascertain whether there is "probable cause to believe that the person has committed a crime during said period of release." G. L. c. 276, § 58, third par. Second, the court "shall then determine, in the exercise of its discretion, whether the release of said person will seriously endanger any person or the community." Id. A judge making this second determination must consider the factors set forth in the statute.(5) If the probable cause and dangerousness inquiries are satisfied, then the judge "may revoke bail on the prior charge and may order said person held without bail pending the adjudication of

said prior charge, for a period not to exceed sixty days" (emphasis added).(6) Id.

Contrary to the defendant's argument, the inquiry into dangerousness under the third paragraph of G. L. c. 276, § 58, does not create a broad preventive detention scheme that is punitive in nature and arbitrarily infringes on a defendant's fundamental liberty interest. He relies on Aime v. Commonwealth, supra, where we considered the constitutionality of several 1992 amendments to the first paragraph of G. L. c. 276, § 58, which expanded the powers of District Courts to set bail at a defendant's arraignment under a preventive detention scheme "calculated to protect the public from an arrestee's claimed dangerousness." Id. at 675. In that case, we concluded that the challenged amendments violated the Fourteenth Amendment because they authorized the pretrial detention of a defendant for the purpose of protecting the public from his predicted dangerous behavior without affording him the protections of due process. Id. at 682-683. Rather than expand the powers of District Courts to detain defendants who are dangerous, the third paragraph of § 58 in substance creates a statutory bail revocation procedure that expands the rights of defendants by limiting the cases in which bail may be revoked to those involving defendants who have been charged with committing a subsequent serious offense and, because of the nature of the offense, constitute a danger. The power of District Courts to revoke bail under the procedure created by § 58 is thus narrower than the court's inherent power to revoke bail.

Notwithstanding the provisions of the third paragraph of G. L. c. 276, § 58, and any inquiry into dangerousness, a court has inherent power to revoke a defendant's bail for breach of any condition of release. See Jake J. v. Commonwealth, 433 Mass. 70, 78 (2000). Other jurisdictions that have considered the matter have

reached a similar conclusion. See, e.g., Rendel v. Mummert, supra at 238-239 ("Pretrial release with restrictions placed upon a defendant's actions has long represented a compromise between the liberties that a person normally enjoys and the right of the [S]tate to insure compliance with its processes"); State v. Ayala, 222 Conn. 331, 346-347 (1992) (State bail statute implemented inherent judicial authority of trial court to compel compliance with conditions of release); People ex rel. Hemingway v. Elrod, 60 Ill. 2d 74, 83-84 (1975) (court has inherent authority to enforce its orders, to require reasonable conduct from those over whom it has jurisdiction, and to impose sanctions for noncompliance, including revocation of release); Mello v. Superior Court, 117 R.I. 578, 583-584 (1977) (specific statute granting judge authority to revoke bail unnecessary because court with jurisdiction over criminal case has power to enforce bail orders just as it has power to enforce other orders). Standards promulgated by the American Bar Association (ABA) are also in accordance with this view. They note that "[t]he concept of conditional pretrial release would be meaningless if courts lacked the power to rescind release after release conditions have been violated. . . . Defendants who have violated those terms have disregarded judicial orders. As long as they are proceeded against in a constitutionally fair fashion, they may be incarcerated in the same manner as persons convicted of contempt." Rendel v. Mummert, supra at 238-239 ("Pretrial release with restrictions placed upon a defendant's actions has long represented a compromise between the liberties that a person normally enjoys and the right of the [S]tate to insure compliance with its processes"). ABA Standards for Criminal Justice, Pretrial Release Standards § 10-5.8(a) at 129 (1989). See Commonwealth v. Dodge, 428 Mass. 860, 862-863 (1999) (violation of order of release subject to conditions sufficient basis to warrant judgment of

criminal contempt). A defendant who commits any offense while free on bail or on personal recognizance may have his bail (or recognizance) revoked under the inherent powers of a court. In these circumstances, the revocation of bail is a necessary step to ensure compliance with our legal system and preserve its integrity. A defendant cannot be heard to complain that his constitutional right to liberty has been violated when continued freedom was entirely within his own control, and the deprivation thereof was an inevitable consequence of his alleged failure to conform his conduct to the laws of this Commonwealth and to the explicit condition of his earlier release.

Although the public may benefit indirectly from the detention of a defendant whose bail is revoked pursuant to the third paragraph of § 58 because he may be dangerous, the purpose of § 58 is not "calculated to protect the public" from a dangerous person, Aime v. Commonwealth, supra at 675, but to assure compliance with its laws and to preserve the integrity of the judicial process by exacting obedience with its lawful orders. Subsequent legislation buttresses this construction of § 58. A significant aspect of the Legislature's response to our decision in Aime was the enactment of G. L. c. 276, § 58A, a broad preventive detention scheme that allows a judge to detain, before trial, a person accused of certain crimes on the ground of that person's dangerousness, see Mendonza v. Commonwealth, 423 Mass. 771 (1996) (upholding constitutionality of preventive detention scheme of G. L. c. 276, § 58A), and the enactment of G. L. c. 276, § 58B, which allows a judge to revoke the bail of such dangerous person for the violation of a condition of his release. See St. 1994, c. 68, § 6. The Legislature is presumed to be aware of existing statutes when it amends a statute or enacts a new one. See Commonwealth v. Russ R., 433 Mass. 515, 520 (2001); Charland v. Muzi Motors, Inc., 417

Mass. 580, 582-583 (1994). In addition, when two or more statutes relate to the same subject matter, "they should be construed together so as to constitute a harmonious whole," create a consistent body of law, and give full effect to the expressed intent of the Legislature. Board of Educ. v. Assessor of Worcester, 368 Mass. 511, 513-514 (1975). See Everett v. Revere, 344 Mass. 585, 589 (1962). If the Legislature had intended to utilize bail revocation under the third paragraph of G. L. c. 276, § 58, as a broad preventive detention scheme with a focus on dangerousness, then the promulgation of G. L. c. 276, §§ 58A and 58B, would have been duplicative and unnecessary. See Boston Water & Sewer Comm'n v. Metropolitan Dist. Comm'n, 408 Mass. 572, 578 (1990) (Legislature presumed to understand and intend all consequences of its acts). That the Legislature appreciated the distinction between G. L. c. 276, § 58, and G. L. c. 276, § 58A, and realized that bail revocation was not preventive detention, is readily apparent from the different criteria for dangerousness under each statute, the difference in the period of detention (sixty days pursuant to § 58, and ninety days pursuant to § 58A), the permissive language of the third paragraph of § 58 (court may revoke bail) versus the mandatory language of § 58A (3) (justice shall order detention), and the language of the last paragraph of § 58, as amended through St. 1994, c. 68, § 5, legislation that inserted § 58A, which indicates that orders for preventive detention will be determined under § 58A.(7)

We conclude that the third paragraph of G. L. c. 276, § 58, is narrowly tailored to further the Commonwealth's legitimate and compelling interests in assuring compliance with its laws, and in preserving the integrity of the judicial process by exacting obedience to its lawful orders which, in this case, established

conditions of the defendant's pretrial release. It does not violate principles of substantive due process.

(b) Procedural due process. "When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). This requirement has traditionally been referred to as 'procedural' due process." United States v. Salerno, 481 U.S. 739, 746 (1987). A fundamental requisite of "procedural" due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The concept is flexible, see Roe v. Attorney Gen., 434 Mass. 418, 427 (2001), and the features of the required hearing will be determined by the "nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). The potential deprivation of liberty implicates the protections of procedural due process. See Commonwealth v. Travis, 372 Mass. 238, 250 (1977) (due process protections attach to proceedings for civil commitment of sexually dangerous persons because of potential for loss of liberty). "In determining what process is due . . . this court 'must balance the interests of the individual affected, the risk of erroneous deprivation of those interests and the government's interest in the efficient and economic administration of its affairs.'" Commonwealth v. Barboza, 387 Mass. 105, 112, cert. denied, 459 U.S. 1020 (1982), quoting Thompson v. Commonwealth, 386 Mass 811, 817 (1982). See Mathews v. Eldridge, supra at 334-335.

The first inquiry at a bail revocation proceeding under § 58 is whether, after a hearing at which the defendant shall have the right to be represented by counsel, there is probable cause to believe that the defendant committed a crime during the period of his release. See G. L. c. 276, § 58, third par. Contrary to the defendant's

argument, the probable cause to arrest standard, rather than the standard of probable cause to bind over ("directed verdict") set forth in Myers v. Commonwealth, 363 Mass. 843 (1973), is appropriate to a bail revocation hearing. Such test for probable cause is objective. See Commonwealth v. Franco, 419 Mass. 635, 639 (1995). "[P]robable cause exists where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense." Commonwealth v. Landry, 438 Mass. 206, 210 (2002), quoting Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992). "'Probable cause is a relatively low threshold,' requiring only sufficiently trustworthy information to instill in a reasonable person the requisite belief of criminality." Richardson v. Boston, 53 Mass. App. Ct. 201, 206 (2001), quoting White v. Marblehead, 989 F. Supp. 345, 349 (D. Mass. 1997). It is the standard by which a criminal complaint issues, see G. L. c. 218, § 35A, and a defendant is reintroduced into the judicial system, effectively notifying a judge that the condition of release on the prior charge has been violated.

The probable cause to bind over standard requires a judge to view the case as if it were a trial and to determine whether the Commonwealth has presented sufficient legally competent evidence to send the case to a jury. See Myers v. Commonwealth, supra at 849-850. The primary purpose of a bind-over hearing, which is an adversary proceeding in nature, is to screen out those cases that should not go to trial. Id. at 852. This is neither a function nor a component of a bail revocation hearing. Moreover, a bind-over hearing is held after a complaint has been filed, the defendant has been arraigned, and the pretrial detention determination has been made. See G. L. c. 276, § 38. In contrast, a

bail revocation hearing "shall be held upon the person's first appearance before the court before which the person is charged with committing an offense while on release pending adjudication of a prior charge." G. L. c. 276, § 58, third par. The third paragraph provides the court with an appropriate mechanism for handling defendants who have failed to abide by conditions of their pretrial release and is not aimed at testing the sufficiency of the Commonwealth's case at trial. Cf. Rendel v. Mummert, 106 Ariz. 233, 238 (1970); State v. Avala, 222 Conn. 331, 348 (1992); People ex rel. Hemingway v. Elrod, 60 Ill. 2d 74, 83 (1975).

If probable cause has been established as to the new offense, the next inquiry is whether the release of such person will seriously endanger any person or the community. The Legislature has committed the second inquiry to the discretion of the judge. The criteria for making the second determination are expressly set forth in the third paragraph of § 58. They are straightforward and easily understood, and are not unconstitutionally vague. Cf. Commonwealth v. Querubin, ante , (2003). As such, the statute does not violate principles of procedural due process.

The determinations of probable cause and dangerousness can be made without a full-blown evidentiary hearing and without "significant risk of an erroneous deprivation of liberty." Commonwealth v. Querubin, supra at , citing Thompson v. Commonwealth, 386 Mass. 811, 817 (1982). The detention is temporary, and a defendant "so held shall be brought to trial as soon as reasonably possible." G. L. c. 276, § 58, third par. A bail revocation proceeding is not intended to be a mini-trial, and the rules of evidence do not apply. Cf. Commonwealth v. Querubin, supra. These determinations can be adequately presented and decided based on documents (e.g., police reports) and the representations of counsel. Nevertheless, an evidentiary hearing

with the right to present and cross-examine witnesses, or some variation, may be held in the judge's discretion when the circumstances of a particular case warrant.

3. Sufficiency of the evidence. The defendant argues that the judge relied on unreliable hearsay in making his determination that there was probable cause to believe that he had committed a crime while free on bail. After the conclusion of the bail revocation hearing in the District Court, the judge stated that he had found probable cause to believe that the defendant had violated a c. 209A order during the period of his release, based on the district attorney's statements concerning the crime and on the police report that had been presented. In that report, Detective J.D. Costa of the Fall River police department stated that on September 26, 2002, he had spoken with the complainant, who had informed him that she had obtained a protective order against the defendant, her former boy friend. Detective Costa verified this fact with the Probate Court in Taunton. The complainant told Detective Costa that she had received a telephone call from the defendant's friend, Andy Cloutier, who had told her, "I'm calling for [the defendant], and he said that he is going to get back at you and try to get the kid." Based on this information, the defendant was arrested. While Detective Costa was transporting the defendant to the police station, the defendant stated that he had never telephoned the complainant, that he had told Cloutier not to telephone the complainant, and that it was the complainant who had telephoned him to say that she was throwing out his clothes.

The police report, which was offered for the truth of what it asserted, namely, that the defendant had committed a crime, was hearsay. While a judge's determination of probable cause to bind a defendant over for trial must be based on competent testimony that would be admissible at trial, determinations of probable cause to

arrest can be based solely on hearsay testimony. See Myers v. Commonwealth, supra at 849 n.6. Statements of victims to police are sufficiently reliable for the purpose of establishing probable cause to arrest. See Commonwealth v. Cruz, 373 Mass. 676, 684 (1977). Statements of police officers concerning their own observations and a description of their own activities, as well as those of other officers, are similarly reliable for purposes of establishing probable cause. See Commonwealth v. Antobenedetto, 366 Mass. 51, 55 (1974). Here, the judge could properly rely on the information in the police report to make a determination of probable cause to believe that the defendant had committed a crime while free on bail.(8)

4. Other issues. The defendant contends that the judge violated his due process rights by refusing to reopen the bail revocation hearing and allow him to present the testimony of witnesses who had knowledge of the circumstances surrounding the subsequent offense. Whether to reopen a hearing is a matter within the discretion of the judge. See Commonwealth v. Lopez, 433 Mass. 406, 414 (2001). Here, the judge correctly determined that the proffered testimony went to the merits of the case, and not to the question of probable cause to arrest. The defendant has failed to show that the judge abused his discretion.

The defendant asserts that his due process rights were violated when the judge failed to provide a written statement of the reasons why the defendant's bail was being revoked, and that the judge failed to find that his release "will seriously endanger any person or the community and that the detention of the [defendant] is necessary to reasonably assure the safety of any person or the community." G. L. c. 276, § 58, third paragraph. We disagree. Contrary to the defendant's assertion, the judge memorialized his reasons by completing a preprinted form entitled "Revocation of

Terms of Release," which encompassed the necessary considerations required by the third paragraph of G. L. c. 276, § 58. Cf. Commonwealth v. Gonsalves, 437 Mass. 1022 (2002) (no requirement that single justice engage in factor-by-factor analysis or make detailed written findings where it appears that appropriate factors considered).

Finally, we address the relationship between the revocation of bail on the earlier charge and the setting of bail on the new offense. After the judge revoked the defendant's bail on the original charge, he allowed the Commonwealth to "reserve" its request for a bail hearing on the subsequent charge until the defendant's term of detention on the revocation had concluded. Because the defendant had been arrested on the subsequent offense and had not been "released on his personal recognizance without surety" before arraignment on the new charge, he was entitled to "forthwith be brought before the next session of the district court for a review of the order to recognize in accordance with the standards set forth in [§ 58]." G. L. c. 276, § 58, third par. There is no authority for the Commonwealth's assertion that it can "reserve" its right to a bail hearing on the subsequent charge until some future date. Moreover, there may be serious practical consequences to a failure to set bail on the subsequent offense. For example, if the original charge were to have been resolved within sixty days without imposition of a direct sentence, there would be nothing holding the defendant on the subsequent charge. Thus, notwithstanding an order revoking bail on the earlier charge, the judge should proceed to set bail on the new offense, thereby establishing the defendant's bail status so that it may be implemented immediately in the event that the earlier charge is resolved in a manner that would release the defendant.

5. Conclusion. The order revoking the defendant's bail is affirmed.

So ordered.

Footnotes

(1) We acknowledge the amicus brief filed by the Committee for Public Counsel Services.

(2) The defendant was ordered held without bail until November 8, 2002, the date of his pretrial hearing. There is nothing in the record to indicate what has happened to the defendant's case since that time.

(3) In his brief, the defendant also asserts that G. L. c. 276, § 58, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and art. 1 of the Massachusetts Declaration of Rights, as amended, because it provides defendants with fewer due process protections in determining pretrial release than are afforded to similarly situated individuals under G. L. c. 276, §§ 58A and 58B. The defendant did not specifically raise this issue either at his bail revocation hearing before the District Court judge or in his petition for relief pursuant to G. L. c. 211, § 3. Accordingly, this issue has been waived. See Commonwealth v. Doe, 405 Mass. 676, 681 n.4 (1989).

(4) Pursuant to the third paragraph of G. L. c. 276, § 58, the court shall enter in writing on the docket the fact that the person was informed that if he were charged with a crime during the period of his release, then his bail could be revoked. The docket shall constitute prima facie evidence that the person was so informed. Id.

(5) These factors include "the gravity, nature and circumstances of the offenses charged, the person's record of convictions, if any, and whether said charges or convictions are for offenses involving the use or threat of physical force or violence against any person, whether the person is on probation, parole or other release pending completion of sentence for any conviction, whether he is on release

pending sentence or appeal for any conviction, the person's mental condition, and any illegal drug distribution or present drug dependency." G. L. c. 276, § 58, third par.

(6) Under G. L. c. 276, § 58B, a person who has been released after a hearing pursuant to § 58A and who has violated his condition of release, may be subject to a revocation of release and an order of detention up to ninety days. The hearing pursuant to § 58A addresses the issue of pretrial detention of persons accused of certain enumerated crimes based specifically on that person's dangerousness. See G. L. c. 276, § 58A; Mendonza v. Commonwealth, 423 Mass. 771 (1996).

(7) The defendant has argued that the bail revocation hearing held by the District Court in this case violated his due process rights because the last paragraph of G. L. c. 276, § 58, mandates that, where the Commonwealth seeks an order of pretrial detention based on dangerousness for an offense enumerated in G. L. c. 276, § 58A, then a hearing must be held pursuant to the provisions of § 58A (4). As we have discussed, a hearing pursuant to § 58A to allow preventive detention of dangerous individuals is not analogous to a hearing pursuant to § 58 to allow revocation of bail for breach of an explicit condition of release. As a consequence, a defendant is not entitled to the same due process rights under § 58 as are afforded under § 58A.

(8) Where a clerk-magistrate has already made a determination of probable cause to believe that the defendant has committed a crime, a judge may rely on that determination alone.

07-3-LM-007008 Fall River App. B-2

Revocation of Terms of Release

Defendants Name: Paquette **Date:** 9/27/07 **Court:** Fall River

Findings:

- ☐ Defendant is on release in the above matter on
  - ☐ Personal Recognizance
  - ☒ Bail: $500
  - ☒ Defendant is before the court charged with the subsequent offense of: 07-3-LM-007033 Fall River same Rape offense.
  - ☒ There is probable cause to believe defendant has committed the crime(s) of: Rape and Abuse of a Child during said period of release. 9/27/07.

Order:

Having considered the gravity, nature and circumstances of the offense charged, the defendant's record of convictions, the fact that the charges are/are not for offenses involving the use or threat of physical force or violence against another person, the fact that the defendant is/is not on probation, parole, or other release pending completion of a sentence or appeal, the defendant's mental condition, present drug dependency and/or illegal drug distribution:

The court determines that the release of said defendant will seriously endanger

- ☒ **Any Person**
- ☒ **The Community**

And that

- ☒ **Detention of the defendant is necessary to reasonably assure the safety of**
  - ☒ **Any Person**
  - ☒ **The Community**

The Court hereby revokes said

- ☒ **Bail** Under $500,000 June 2008 Fall River
- ☐ **Personal Recognizance and orders the defendant held without bail until_____(said period not to exceed 60 days).**

Date: 9/27/07

Justice

18 U.S.C.S. § 3142 (2002)

§ 3142. Release or detention of a defendant pending trial

(a) In general. Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be--

(1) Released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;

(2) released on a condition or combination of conditions under subsection (c) of this section;

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

(4) detained under subsection (e) of this section.

(b) Release on personal recognizance or unsecured appearance bond. The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) Release on conditions.

(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person--

(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person--

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to

the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act *(21 U.S.C. 802),* without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

(d) Temporary detention to permit revocation of conditional release, deportation, or exclusion. If the judicial officer determines that--

(1) such person--

(A) is, and was at the time the offense was committed, on--

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act *(8 U.S.C. 1101*(a)(20)); and

(2) the person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of the person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, the person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

(e) Detention. If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other

person and the community, such judicial officer shall order the detention of the person before
trial. In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that--

(1) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

(2) the offense described in paragraph (1) of this subsection was committed while the person was on release pending trial for a Federal, State, or local offense; and

(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1) of this subsection, whichever is later.

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act *(21 U.S.C. 801* et seq.), the Controlled Substances Import and Export Act *(21 U.S.C. 951* et seq.), the Maritime Drug Law Enforcement Act *(46 U.S.C. App. 1901* et seq.), or an offense under section 924(c), 956(a), or 2332b of title 18 of the United States Code.

(f) Detention hearing. The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set

forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community--

(1) upon motion of the attorney for the Government, in a case that involves--

(A) a crime of violence;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act *(21 U.S.C. 801* et seq.), the Controlled Substances Import and Export Act *(21 U.S.C. 951* et seq.), or the Maritime Drug Law Enforcement Act *(46 U.S.C. App. 1901* et seq.); or

(D) any felony if the person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves--

(A) a serious risk that such person will flee; or

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the

Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, the person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

(g) Factors to be considered. The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning--

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including--

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) Contents of release order. In a release order issued under subsection (b) or (c) of this section, the judicial officer shall--

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of--

(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

(i) Contents of detention order. In a detention order issued under subsection (e) of this section, the judicial officer shall--

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that the person be afforded reasonable opportunity for private consultation with counsel; and

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) Presumption of innocence. Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

M.G.L. c. 276, § 58, Paragraph 3

Chapter 276: Section 58. Release on personal recognizance or unsecured appearance bond; determination; fees; refusal; petition for review.

[A] person aforesaid charged with an offense and not released on his personal recognizance without surety by a clerk or assistant clerk of the district court, a bail commissioner or master in chancery shall forthwith be brought before the next session of the district court for a review of the order to recognize in accordance with the standards set forth in the first paragraph of this section. The court shall provide as an explicit condition of release for any person admitted to bail pursuant to this section or section fifty-seven that should said person be charged with a crime during the period of his release, his bail may be revoked in accordance with this paragraph and the court shall enter in writing on the court docket that the person was so informed and the docket shall constitute prima facie evidence that the person was so informed. If a person is on release pending the adjudication of a prior charge, and the court before which the person is charged with committing a subsequent offense after a hearing at which the person shall have the right to be represented by counsel, finds probable cause to believe that the person has committed a crime during said period of release, the court shall then determine, in the exercise of its discretion, whether the release of said person will seriously endanger any person or the community. In making said

determination, the court shall consider the gravity, nature and circumstances of the offenses charged, the person's record of convictions, if any, and whether said charges or convictions are for offenses involving the use or threat of physical force or violence against any person, whether the person is on probation, parole or other release pending completion of sentence for any conviction, whether he is on release pending sentence or appeal for any conviction, the person's mental condition, and any illegal drug distribution or present drug dependency. If the court determines that the release of said person will seriously endanger any person or the community and that the detention of the person is necessary to reasonably assure the safety of any person or the community, the court may revoke bail on the prior charge and may order said person held without bail pending the adjudication of said prior charge, for a period not to exceed sixty days. The hearing shall be held upon the person's first appearance before the court before which the person is charged with committing an offense while on release pending adjudication of a prior charge, unless that person, or the attorney for the commonwealth, seeks and the court allows, a continuance because a witness or document is not immediately available. Except for good cause, a continuance on motion of the person shall not exceed seven days and on motion of the attorney for the commonwealth may not exceed three business days. During such continuance, the person may be detained consistent with the provisions of this section. Said order shall state in writing the reasons therefor and shall be reviewed by the court upon the acquittal of the person, or the dismissal of, any of the cases involved. A person so held shall be brought to trial as soon as reasonably possible. A person aggrieved by the denial of a district court justice to admit him to bail on his personal recognizance without surety may petition the superior court for a review of the

order of the recognizance and the justice of the district court shall thereupon immediately notify such person of his right to file a petition for review in the superior court. When a petition for review is filed in the district court or with the detaining authority subsequent to petitioner's district court appearance, the clerk of the district court or the detaining authority, as the case may be, shall immediately notify by telephone, the clerk and probation officer of the district court, the district attorney for the district in which the district court is located, the prosecuting officer, the petitioner's counsel, if any, and the clerk of courts of the county to which the petition is to be transmitted. The clerk of the district court, upon the filing of a petition for review, either in the district court or with the detaining authority, shall forthwith transmit the petition for review, a copy of the complaint and of the record of the court, including the appearance of the attorney, if any is entered, and a summary of the court's reasons for denying the release of the defendant on his personal recognizance without surety to the superior court for the county in which the district court is located, if a justice thereof is then sitting, or to the superior court of the nearest county in which a justice is then sitting; the probation officer of the district court shall transmit forthwith to the probation officer of the superior court, copies of all records of the probation office of said district court pertaining to the petitioner, including the petitioner's record of prior convictions, if any, as currently verified by inquiry of the commissioner of probation. The district court or the detaining authority, as the case may be, shall cause any petitioner in its custody to be brought before the said superior court on the same day the petition shall have been filed, unless the district court or the detaining authority shall determine that such appearance and hearing on the petition cannot practically take place before the adjournment of the sitting of said superior court for that day and in

which event, the petitioner shall be caused to be brought before said court for such hearing during the morning of the next business day of the sitting of said superior court. The district court is authorized to order any officer authorized to execute criminal process to transfer the petitioner and any papers herein above described from the district court or the detaining authority to the superior court, and to coordinate the transfer of the petitioner and the papers by such officer. The petition for review shall constitute authority in the person or officer having custody of the petitioner to transport the petitioner to said superior court without the issuance of any writ or other legal process, provided, however, that any district or superior court is authorized to issue a writ of habeas corpus for the appearance forthwith of the petitioner before the superior court....

M.G.L. c. 276, § 58A

§ 58A. Pretrial Detention or Release on Condition for Certain Offenders; Hearing; Petition for Review.

(1) The commonwealth may move, based on dangerousness, for an order of pretrial detention or release on conditions for a felony offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person of another, or any other felony that by its nature involves a substantial risk that physical force against the person of another may result, including the crime of burglary and arson whether or not a person has been placed at risk thereof, or a violation of an order pursuant to section eighteen, thirty-four B or thirty-four C of chapter two hundred and eight, section thirty-two of chapter two hundred and nine, section three, four or five of chapter two hundred and nine A, or section fifteen or twenty of chapter two hundred and nine C, or arrested

and charged with a misdemeanor or felony involving abuse as defined in section one of said chapter two hundred and nine A or while an order of protection issued under said chapter two hundred and nine A was in effect against said person, an offense for which a mandatory minimum term of three years or more is prescribed in chapter ninety-four C, arrested and charged with a violation of section thirteen B of chapter two hundred and sixty-eight or a third or subsequent conviction for a violation of section twenty-four of chapter ninety.

(2) Upon the appearance before a superior court or district court judge of an individual charged with an offense listed in subsection (1) and upon the motion of the commonwealth, the judicial officer shall hold a hearing pursuant to subsection (4) issue an order that, pending trial, the individual shall either be released on personal recognizance without surety; released on conditions of release as set forth herein; or detained under subsection (3).

If the judicial officer determines that personal recognizance will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person--

(A) subject to the condition that the person not commit a federal, state or local crime during the period of release; and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community that the person--

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to

assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode or travel;

(v) avoid all contact with an alleged victim of the crime and with any potential witness or witnesses who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial service agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information

regarding existing encumbrances as the judicial officer may require;

(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

The judicial officer may at any time amend the order to impose additional or different conditions of release.

(3) If, after a hearing pursuant to the provisions of subsection (4), the district or superior court justice finds by clear and convincing evidence that no conditions of release will reasonably assure the safety of any other person or the community, said justice shall order the detention of the person prior to trial. A person detained under this subsection shall be brought to a trial as soon as reasonably possible, but in absence of good cause, the person so held shall not be detained for a period exceeding ninety days excluding any period of delay as defined in Massachusetts Rules of

Criminal Procedure Rule 36(b)(2). A justice may not impose a financial condition under this section that results in the pretrial detention of the person. Nothing in this section shall be interpreted as limiting the imposition of a financial condition upon the person to reasonably assure his appearance before the courts.

(4) When a person is held under arrest for an offense listed in subsection (1) and upon a motion by the commonwealth, the judge shall hold a hearing to determine whether conditions of release will reasonably assure the safety of any other person or the community.

The hearing shall be held immediately upon the person's first appearance before the court unless that person, or the attorney for the commonwealth, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed seven days, and a continuance on motion of the attorney for the commonwealth may not exceed three business days. During a continuance, the individual shall be detained upon a showing that there existed probable cause to arrest the person. At the hearing, such person shall have the right to be represented by counsel, and, if financially unable to retain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information. The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing. The facts the judge uses to support findings pursuant to subsection (3), that no conditions will reasonably assure the safety of any other person or the community, shall be supported by clear and convincing evidence. In a detention order issued pursuant to the provisions of said subsection (3) the judge shall (a) include written findings of fact and a written statement of the reasons for the detention; (b)

direct that the person be committed to custody or confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentence or being held in custody pending appeal; and (c) direct that the person be afforded reasonable opportunity for private consultation with his counsel. The person may be detained pending completion of the hearing. The hearing may be reopened before or after a determination by the justice, at any time before trial if the justice finds that information exists that was not known at the time of the hearing and that has a material bearing on the issue and whether there are conditions of release that will reasonably assure the safety of any other person and the community.

(5) In his determination as to whether there are conditions of release that will reasonably assure the safety of any other individual or the community, said justice, shall, on the basis of any information which he can reasonably obtain, take into account the nature and seriousness of the danger posed to any person or the community that would result by the person's release, the nature and circumstances of the offense charged, the potential penalty the person faces, the person's family ties, employment record and history of mental illness, his reputation, the risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror, his record of convictions, if any, any illegal drug distribution or present drug dependency, whether the person is on bail pending adjudication of a prior charge, whether the acts alleged involve abuse as defined in section one of chapter two hundred and nine A, or violation of a temporary or permanent order issued pursuant to section eighteen or thirty-four B of chapter two hundred and eight, section thirty-two of chapter two hundred and nine,

sections three, four or five of chapter two hundred and nine A, or sections fifteen or twenty of chapter two hundred and nine C, whether the person has any history of orders issued against him pursuant to the aforesaid sections, whether he is on probation, parole or other release pending completion of sentence for any conviction and whether he is on release pending sentence or appeal for any conviction.

(6) Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

(7) A person aggrieved by the denial of a district court justice to admit him to bail on his personal recognizance with or without surety may petition the superior court for a review of the order of the recognizance and the justice of the district court shall thereupon immediately notify such person of his right to file a petition for review in the superior court. When a petition for review is filed in the district court or with the detaining authority subsequent to petitioner's district court appearance, the clerk of the district court or the detaining authority, as the case may be, shall immediately notify by telephone, the clerk and probation officer of the district court, the district attorney for the district in which the district court is located, the prosecuting officer, the petitioner's counsel, if any, and the clerk of courts of the county to which the petition is to be transmitted. The clerk of the district court, upon the filing of a petition for review, either in the district court or with the detaining authority, shall forthwith transmit the petition for review, a copy of the complaint and the record of the court, including the appearance of the attorney, if any is entered, and a summary of the court's reasons for denying the release of the defendant on his personal recognizance with or without surety to the superior court for the county in which the district court is located, if a justice thereof is

then sitting, or to the superior court of the nearest county in which a justice is then sitting; the probation officer of the district court shall transmit forthwith to the probation officer of the superior court, copies of all records of the probation office of said district court pertaining to the petitioner, including the petitioner's record of prior convictions, if any, as currently verified by inquiry of the commissioner of probation. The district court or the detaining authority, as the case may be, shall cause any petitioner in its custody to be brought before the said superior court within two business days of the petition having been filed. The district court is authorized to order any officer authorized to execute criminal process to transfer the petitioner and any papers herein above described from the district court or the detaining authority to the superior court, and to coordinate the transfer of the petitioner and the papers by such officer. The petition for review shall constitute authority in the person or officer having custody of the petitioner to transport the petitioner to said superior court without the issuance of any writ or other legal process; provided, however, that any district or superior court is authorized to issue a writ of habeas corpus for the appearance forthwith of the petitioner before the superior court.

The superior court shall in accordance with the standards set forth in section fifty-eight A, hear the petition for review under section fifty-eight A as speedily as practicable and in any event within five business days of the filing of the petition. The justice of the superior court hearing the review may consider the record below which the commonwealth and the person may supplement. The justice of the superior court may, after a hearing on the petition for review, order that the petitioner be released on bail on his personal recognizance without surety, or, in his discretion, to

reasonably assure the effective administration of justice, make any other order of bail or recognizance or remand the petitioner in accordance with the terms of the process by which he was ordered committed by the district court.